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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted]35

ANDRIJA ARTUKOVIC, *Petitioner*

v.

RAFO IVANCEVIC, Consul General of the Federal Peoples' Republic of Jugoslavia

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ANDRIJA ARTUKOVIC, *Petitioner*

v.

JAMES J. BOYLE, United States Marshal

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Andrija Artukovic, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled causes.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on February 19, 1954, and is unreported. Said opinion appears at pages 404-431 of the printed Transcript of Record herewith.

The opinion of the District Court of the United States for the Southern District of California is reported at 107 F. Supp. 11, and appears at pages 35-92 of the printed Transcript of Record herewith.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on February 19, 1954 in the above-entitled causes.

Rehearing was not sought.

The jurisdiction of the Supreme Court of the United States to review by writ of certiorari the said judgment of the Court of Appeals for the Ninth Circuit is invoked under Title 28, United States Code, Section 1254(1)

QUESTIONS PRESENTED FOR REVIEW

Is a treaty of extradition in effect between the United States and the Federal Peoples' Republic of Yugoslavia?

Has a treaty of extradition been executed and ratified between the United States and the Federal Peoples' Republic of Yugoslavia, or the Kingdom of Yugoslavia, or the Kingdom of the Serbs, Croats and Slovenes in such state names?

If not, is a treaty of extradition executed and ratified between the United States and the Kingdom of Serbia in 1902 in effect between the United States and the Federal Peoples' Republic of Yugoslavia?

Did the United States in 1919 take a political decision in the conduct of foreign relations that the Kingdom of the Serbs, Croats and Slovenes was a new State?

Did the United States in 1919 take a political decision in the conduct of foreign relations that the Kingdoms of Serbia and Montenegro were extinguished as international States?

If so, did the extinction of the Kingdom of Serbia as an international State operate to terminate treaties theretofore existing between the United States and Serbia?

Did the United States, by an act in the conduct of its foreign relations, recognize the termination of its treaties with Serbia?

May terminated treaties be renewed or revived without full compliance with the requirements of Article II, Section 2, United States Constitution?

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The following constitutional provisions, treaties and statutes are involved:

That part of Article II, Section 2, United States Constitution, reading—

> "2. He [the President] shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur; * * * ."

The Treaty of Extradition between the United States and Serbia, proclaimed May 17, 1902, (32 Stats., part 2, 1890). As no challenge is raised to the terms, articles, provisions or other language of this Treaty, or to the fact that it became effective in 1902, and as this Treaty is set forth at pages 68-70 of the printed Transcript of Record attached, it is not set forth herein or as an appendix. The alleged termination of this Treaty is based upon acts of the United States Government set forth hereinafter.

Title 18, U.S.C., Sec. 3181, reading—

"Sec. 3181. Scope and limitation of chapter.

"The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government."

Title 18, U.S.C., Sec. 3184, reading—

"Sec. 3184. Fugitives from foreign country to United States.

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

STATEMENT OF THE CASE

This case had its beginning on August 29, 1951, when petitioner Andrija Artukovic was arrested at Los Angeles by the United States Marshal bearing warrant of arrest issued by the United States Commissioner for the Southern District of California upon basis of an extradition complaint filed with him by Rafo Ivancevic, Consul Gen-

eral of the Federal Peoples' Republic of Yugoslavia, under the provisions of Title 18, U.S.C., Secs. 3181 and 3184, and an alleged treaty of extradition between the United States and the Federal Peoples' Republic of Yugoslavia.

On September 10, 1951, petitioner's request for release on bail was denied by the said United States Commissioner as lacking authority to grant bail in such case under Title 18, U.S.C., Sec. 3141. Thereafter, on September 11, he petitioned the United States District Court for the Southern District of California, Central Division, for a writ of habeas corpus seeking release on bail, and, after preliminary hearing, amended and enlarged such writ on September 19, 1951, by permission of the said District Court, to seek release by dismissal of the extradition complaint as not based upon a valid and existing treaty, and further to seek release by dismissal of the said complaint on the ground that the alleged crimes, if committed, were of political character exempted from extradition by an article of the extradition treaty alleged to be in effect. Petitioner was admitted to bail in amount $50,000.

After extensive hearings and briefings, the said District Court, on July 14, 1952, entered opinion, holding that no treaty of extradition existed between the United States and the Federal Peoples' Republic of Yugoslavia, and later ordered dismissal of the extradition complaint. Appeal was taken, and pending same the petitioner was admitted to bail in reduced amount of $5,000.

On appeal, the United States Court of Appeals for the Ninth Circuit entered on February 19, 1954, opinion and order reversing the decision of the District Court, and holding that a treaty of extradition is in effect between the United States and the Federal Peoples' Republic of Yugoslavia.

The issue of the political nature of the crimes charged in the extradition complaint was not decided in the opinion of the District Court, was not an issue on appeal to the Court of Appeals, and is not before this Honorable Court.

Specifically, the Court of Appeals held, and directed the District Court below to find, "that the extradition treaty executed by and between the United States and Serbia in 1902 is a present, valid and effective treaty between the United States and the Federal Peoples' Republic of Yugoslavia, and has been a valid and effective treaty *continuously* since its execution between the United States and Serbia and *through the changes in official title of the latter state to its present title of Federal Peoples' Republic of Yugoslavia.*" (Italicization for emphasis)

Simply, the Court of Appeals held: Yugoslavia is Serbia under another name, and the extradition treaty between the United States and Serbia has been continuously effective since 1902.

It is petitioner's position that in 1919 the United States Government took decisions, and recognized in its conduct of foreign relations, that the Kingdom of the Serbs, Croats and Slovenes (known now as the Federal Peoples' Republic of Yugoslavia) was a new international state; that the Kingdoms of Serbia and Montenegro were extinguished as international states in the creation of the Serb-Croat-Slovene Kingdom; and that by operation of a principle of international law the treaties between the United States and Serbia were terminated; and it is petitioner's position further that no treaty of extradition has been made, revived or renewed, in accord with requirements of the United States Constitution, by and between the United States and the Kingdom of the Serbs, Croats and Slovenes or the Kingdom of Yugoslavia or the Federal Peoples' Republic of Yugoslavia.

Petitioner recognizes that in 1921 the United States Government took another decision that Serbia absorbed the Yugoslav territory formerly part of Austria-Hungary as a result of World War I, and then declared that the treaties between the United States and Serbia were in effect with the whole territory of the Serb-Croat-Slovene State; but petitioner submits that such an attempt to revive, or renew, or make effective terminated treaties is not a valid

exercise of the treaty-making power under the United States Constitution because the advice and consent of the Senate were not had.

Briefly, the historical fact which has given rise to the issues in these causes was the union in December 1918 of the independent Balkan states of Serbia, Montenegro and the State of Slovenes, Croats and Serbs (the latter state then recognized by Serbia but not by the United States, and sometimes hereinafter designated as the Yugoslav territory formerly a part of Austria-Hungary). This union of states was proclaimed as the Kingdom of the Serbs, Croats and Slovenes, and it is conceded that this state became, without material change, the Kingdom of Yugoslavia in 1929 and the Federal Peoples' Republic of Yugoslavia in 1946.

As decisions and acts of the United States Government involving recognition of states and treaty relations are inescapably within the "conduct of its foreign relations", and such conduct is entrusted by the Constitution to the Executive and Legislative branches of the Government (see *Oetjen* v. *Central Leather Company,* 246 U. S. 297, 302), then the following facts, composed in the main of acts and decisions of the United States Government relating to the union of Balkan states in 1918 which were placed before the Court of Appeals but ignored in its opinion, seem pertinent to a determination of the issues raised herein:

1. The kingdoms of Serbia and Montenegro, and, for purposes of later comparison, of Rumania, were recognized as international states at least since the Treaty of Berlin in 1878, and specifically the United States had recognized Serbia as an independent international state at least since 1881 when a treaty was negotiated with that country. (Record, page 412)

2. On January 8, February 11, April 6 and July 4, 1918, the United States, through public political declarations of its Chief Executive, proclaimed its policy in international affairs of "self-determination" for peoples and territories

liberated as a result of World War I; more specifically, that "peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, pages 12, 112, 202, 270; Record, page 82)

3. On May 29, and June 28, 1918, the United States, through its Secretary of State, publicly declared its "sympathy" for the "nationalistic aspirations of the Czecho-Slovaks and Jugo-Slavs for freedom" and "that all branches of the Slav race should be completely freed from German and Austrian rule." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, pages 809, 816; Record, page 89)

4. On August 7, 1918, the American State Department requested its diplomatic agent at Corfu (location of the Serbian Government in exile during World War I) to provide "confidential reports on Serbian Government's position as to the character of relation to be established between Serbia and Yugoslav portion of Austria-Hungary if latter secure their liberty." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, page 823).

5. On August 26 and September 13, 1918, the United States diplomatic representative at Corfu reported at length to the State Department in compliance with the August 7, 1918 directive. (Foreign Relations, U. S., 1918, Vol. I, pages 828 ff. and 852 ff.) As these reports formed an important part of the basis for the later United States decision as to the character of the union creating the Serb-Croat-Slovene Kingdom, they are attached hereto as Appendix 1.

6. On October 14, 1918, Serbia, by diplomatic note, requested a declaration of the United States that it favored the freedom of the Southern Slavs of Austria-Hungary and "their union with Serbia in a free and democratic State, such as was provided for in the Declaration of Corfu." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, page 843).

7. On October 28, 1918, the United States, by diplomatic note, replied to Serbia that "the United States has expressed itself freely in support of the right of the Yugo-Slavs to be entirely freed from Austrian domination and that at the present time it does not feel that it can go further in declaring a policy which manifestly depends upon the self-determination of the peoples involved." (Foreign Relations, U. S., 1918, Supp. 1, Vol. I, page 857).

8. On October 29, 1918, the Yugoslav provinces formerly of Austria-Hungary declared their independence as the State of Slovenes, Croats and Serbs. (Sisic, Documents on the Creation of the Kingdom of the Serbs, Croats and Slovenes, page 211).

9. On November 11, 1918, Serbia, by diplomatic note, informed the United States that it had recognized the government of the Jugoslavs residing within the boundaries of the former Austro-Hungarian Monarchy, and requested the United States to recognize and treat it as an ally. (Record, pages 83, 414, footnote 12).

10. On November 24, 26, and December 1, 1918, the State of Slovenes, Croats and Serbs, the Kingdom of Montenegro, and the Kingdom of Serbia, respectively, took resolution to, and did, unite to form a single independent state, proclaimed by the chosen Chief Executive of the union (Alexander, former Regent of Serbia) as the Kingdom of the Serbs, Croats and Slovenes. (Sisic, Documents on the Creation of the Kingdom of the Serbs, Croats and Slovenes, pages 255, 256; Foreign Relations, U. S., 1919, Vol. II, page 893; Record, pages 413-414, footnote 12).

11. On January 6, 1919, the United States, by diplomatic note, was formally advised of the union known as the Kingdom of the Serbs, Croats and Slovenes, and was requested to recognize it. (Record, pages 85, 415, footnote 12).

12. On January 10, 1919, the United States diplomatic representative in Yugoslavia, in accord with the State De-

partment directive of August 7, 1918, made a lengthy report upon the new State to the State Department in Washington and to the Secretary of State, then in Paris with the American Peace Mission. This informative report was omitted from the quotation in Footnote 12 of the Court of Appeals opinion (Record, page 414 ff.), entitled "Yugoslavia—Recognition of the Kingdom of the Serbs, Croats and Slovenes, February 7, 1919", taken from Foreign Relations, U. S., 1919, Vol. II, page 893 ff., and therefore is included in Appendix 1 hereto.

13. On February 7, 1919, the United States, through the Secretary of State then in Paris, issued a public statement recognizing the Kingdom of the Serbs, Croats and Slovenes. (Foreign Relations, U. S., 1919, Vol. II, page 899). This important act of the United States was not set forth and considered by the Court of Appeals in its opinion, and was omitted, without indication thereof, from the same Footnote 12 mentioned above. This public statement was reported to the State Department at Washington in the following manner:

> "The Commission to Negotiate Peace to the Acting Secretary of State
>
> "Paris, February 6, 1919, 4 p.m.
> "(Received February 7, 1:32 a.m.)
>
> "622. The Secretary of State will give out on February 7 the following statement in regard to the union of the Jugo Slav peoples, which you may give out to the press immediately:
>
> "'On May 29, 1918, the Government of the United States expressed its sympathy for the nationalistic aspirations of the Jugo Slav race and on June 28 declared that all branches of the Slavish race should be completely freed from German and Austrian rule. After having achieved their freedom from foreign oppression the Jugo Slav[s] formerly under Austro-Hungarian rule on various occasions expressed the desire to unite with the Kingdom of Servia. The Servian Government on its part has publicly and officially ac-

cepted the union of the Serb, Croat and Slovene peoples. The Government of the United States, therefore, welcomes the union while recognizing that the final settlement of territorial frontiers must be left to the Peace Conference for determination according to the desires of the peoples concerned.'

"All this statement has been transmitted to Mr. Trumbitch and telegraphed to Dodge at Belgrade.

"AMER[ICAN] MISSION"

(Record, page 89)

14. On September 10, 1919, the United States (and other Allied Powers) and the Serb-Croat-Slovene State executed a treaty at St. Germain-en-Laye, Article 12 of which provided as follows:

"Article 12. Pending the conclusion of new treaties or conventions, all treaties, conventions, agreements and obligations between Serbia, on the one hand, and any of the Principal Allied and Associated Powers, on the other hand, which were in force on the 1st August, 1914, or which have since been entered into, shall ipso facto be binding upon the Serb-Croat-Slovene State."

(Malloy, Treaties, Conventions, etc., Vol. 3, pages 3731 ff.; record, page 62).

15. The United States and the Serb-Croat-Slovene State were parties in the making of treaties with Austria (St. Germain-en-Laye, September 10, 1919); with Bulgaria (Neuilly, November 27, 1919); and with Hungary (Trianon, June 4, 1920); each of these treaties contained articles requiring recognition of the Serb-Croat-Slovene State and renunciation of territory in favor of that State. The articles of the Austrian treaty requiring recognition and renunciation are set forth at page 59 of the transcript of record. There were additional treaties with Turkey containing similar language of recognition of the new state. (Record, pages 58, 60).

It will be noted that of the diplomatic acts of the United States listed among the foregoing facts pertinent to the

issues herein, only the first—recognition of Serbia at least since 1881—is set forth in the opinion of the Court of Appeals. But that Court was not unaware that the diplomatic acts preceding the union of December 1918 should have consideration in determining the nature of such union, and its opinion in these causes is replete with references to diplomatic acts of Serbia and other Balkan states involved in the union, which the Court described as "critical to the issue" (Record, pages 412-414). Petitioner submits that the diplomatic acts and decisions of the United States are "controlling upon the issue".

By examination of the facts numbered 2 through 9, the attitude of the United States immediately preceding the union of December 1918 is plain: It stood upon a policy of "self-determination" of peoples as to their future government in opposition to their annexation or absorption by the victorious states of World War I. Evidence of that is clearly visible in the cautious response of the United States to the Serbian request for recognition of the proposed union in advance of the freedom of the territories and peoples involved. In pursuance of such policy the United States sought (fact No. 4) and obtained information (fact No. 5, Appendix 1) concerning the intent of Serbia toward the territories and peoples seeking freedom.

Then occurred the union of December 1918 (fact No. 10), and in January 1919 the United States received, by undated diplomatic note, formal advice of the union with request for recognition of it. (fact No. 11).

This undated diplomatic note of January 1919 requires brief attention. If Serbia had taken the position that by the union of December 1918 she was annexing or absorbing surrounding states and territories, then the proper Serbian course would not have been to seek recognition of such act by the United States or another international state. The applicable rule of international law is that states may acquire new territorial or other rights by unilateral acts, such as discovery or annexation, or by treaty, without

requiring recognition by a third state for their validity (Oppenheim's International Law, Lauterpacht, Vol. I, 1937, page 139). Thus omission to request recognition would have been the normal course for Serbia had she sought international acknowledgment of her continued existence in an enlarged form. For purposes of comparison, this is exactly the course followed by Rumania, then a Balkan sister state to Serbia, which as a result of World War I more than doubled her size by annexation or absorption of surrounding territory.

That such undated diplomatic note of January 1919 was considered by the United States as a request for recognition has been long ago decided by the United States Department of State (Record, pages 84-85).

Thereupon the Government of the United States had to take a political decision in the conduct of its foreign relations: Was the union merely Serbia enlarged by annexation or absorption? Was the union a new state into which Serbia and other Balkan states and territories had been amalgamated?

If the United States decided that the union was indeed Serbia in a larger form and under another name, its decision would have been evidenced by failure to respond to the diplomatic note of January 1, 1919; for as the United States had continuously recognized Serbia for nearly forty years, it would have been totally unnecessary to re-recognize that state. On the other hand, if the United States decided that the union known as the Kingdom of the Serbs, Croats and Slovenes was a new state, then it would have been proper, in accord with international law, to extend formal recognition and welcome it into the family of nations.

At this juncture the definitions of "recognition" by international jurists are provided as follows:

Moore, International Law Digest, Vol. I, 1906, page 72:

> "Recognition, says Rivier, is the assurance given to a new state that it will be permitted to hold its place

and rank, in the character of an independent political organism, in the society of nations. The rights and attributes of sovereignty belong to it independently of all recognition, but it is only after it has been recognized that it is assured of exercising them. Regular political relations exist only between states that reciprocally recognize them. Recognition is therefore useful, even necessary to the new state. It is also the constant usage, when a state is formed, to demand it. * * *."

Oppenheim's International Law, Lauterpacht, Vol. I, 1937, page 122:

"Sec. 72. Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an International Person and a member of the Family of Nations. If a new State asks formally for recognition and receives it in a formal declaration of any kind, it receives express recognition. * * *."

It will be noted that the authorities speak of recognition of states as being given only to new states. It will be agreed that recognition, in international law, is an act taken pursuant to a political decision of a state. Thus, if it can be established authoritatively that the United States recognized the Kingdom of the Serbs, Croats and Slovenes as a state, then the United States must have decided that the said Kingdom was a new state.

Petitioner draws attention to fact No. 13, and submits that this public statement of the United States Secretary of State on February 7, 1919 was formal and express recognition of the Kingdom of the Serbs, Croats and Slovenes as a state, to-wit, a new state. Authorities supporting this position are the United States Department of State as reported in Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. I, 1945, page 155:

"The Department of State on April 7, 1924, found occasion to declare and its records disclosed the follow-

ing information relative to the recognition by the Government of the United States of the following States:

"'The Kingdom of the Serbs, Croats and Slovenes (Yugoslavia): The Government of the United States recognized the Government of the Kingdom of the Serbs, Croats and Slovenes on February 7, 1919. Announcement was made of this recognition by the Secretary of State of the United States at Paris on that date, while he was a member of the American Commission to Negotiate Peace; * * *."

"* * * Communication to Mr. W. C. Hart, April 7, 1924."

Also in Foreign Relations of the United States, 1919, Vol. II, pages 892-900:

"Yugoslavia—Recognition of the Kingdom of Serbs, Croats and Slovenes, February 7, 1919."

(Record, pages 83-90)

See also Hackworth, Digest of International Law, Vol. I, Chap. III, "Recognition of New States—Yugoslavia", pages 219-222.

When the United States decided that the Serb-Croat-Slovene Kingdom was not an enlarged Serbia under another name, and formally recognized said Kingdom as a new state, its decision and act of recognition were equally decision and recognition that Serbia had disappeared as an international state. On February 7, 1919, the United States was fully informed by its diplomatic representative in Yugoslavia (fact No. 12, Appendix 1) that Serbia had stripped itself of independent governmental organs in becoming absorbed into the Serb-Croat-Slovene Kingdom, i.e., its parliament (Skupschtina) and cabinet were dissolved, and its King and Regent had become King and Regent of the new state without retaining title as the King and Regent of Serbia; the Serb-Croat-Slovene embassies, legations, missions, etc., represented only the new Serb-Croat-Slovene State, not Serbia as well. Thus the

very act of recognition of the new state, in whose formation Serbia had participated, was denial of the existence of Serbia. So also it was denial of the existence of Montenegro and of the State of Slovenes, Croats and Serbs. As an authority on the decision of the United States as to Serbia, the following is quoted from Hyde, International Law Chiefly as Interpreted and Applied by the United States, 1945, Vol. I, pages 126-7:

"UNIONS OF STATES

"Sec. 32. Where International Personality of Members is Relinquished. The terms of a union of States may mark the relinquishment by the members thereof of the privilege of dealing with the outside world, or of being held out to it as distinctive entities in whose behalf as such foreign relations are conducted by an appropriate instrumentality. In such case the union becomes a person or State of international law of which the composition is a matter of unconcern to foreign powers. They recognize the completeness of the merger, and while it lasts, necessarily regard as nonexistent the former States which surrender their international personalities. * * *

"As a result of the World War the Serb, Croat and Slovene people of the former Austro-Hungarian Monarchy united of their own free will with Serbia for the purpose of forming 'a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes.'

"It suffices to observe that quite apart from the appropriateness of the accepted description of such type of unions, the family of nations is concerned solely with the result effected, namely, the single political entity asserting an international personality which has supplanted for purposes of statehood the several constituents which were thus welded together."

Upon the extinction of Serbia as an international state by its absorption into the Kingdom of the Serbs, Croats and Slovenes, the following rule of international law operated to terminate the treaties between Serbia and the United States:

"A treaty to which only two States are parties is terminated when one of the parties becomes extinct."

(Research in International Law, Harvard, 29 A.J.I.L. Supp. Part III, 1935, pages 1165-6) (See Also Hyde, International Law etc., Vol. II, 1945, page 83; Fenwick, International Law, 1934, page 122; Oppenheim's International Law, Lauterpacht, Vol. I, 1937, page 745)

This universally recognized rule of international law is specifically recognized by the United States as amicus curiae in the instant causes (Record, page 406, footnote 4).

The United States, recognizing the termination of its treaties with Serbia, then attempted to place them in effect with the new Serb-Croat-Slovene State by Article 12 of the Treaty of St. Germain-en-Laye executed with that State on September 10, 1919 (see fact No. 14). Attention is drawn to the contrast of the United States' conduct of foreign relations with Rumania, a true "enlarged state". On December 9, 1919, the United States executed a treaty with Rumania known as the Treaty of Paris (III, Malloy, Treaties, International Acts etc. of the United States, pages 3724 ff.), which contained no article reviving or renewing treaties with Rumania although otherwise the treaty is almost identical with that executed with the Serb-Croat-Slovene State.

The attempt to place the Serbian treaties in effect with the new State failed because the Treaty of St. Germain-en-Laye was never submitted to the Senate.

From February 7, 1919 to May 31, 1921, there is no act of record to show that the United States considered its treaties with Serbia as other than terminated or that any action of the United States Government was taken under the Serbian treaties.

On May 31, 1921, the Solicitor of the United States Department of State prepared the following memorandum, which was supplied by the United States in an annex to its brief as amicus curiae to the Court of Appeals in these causes:

"DEPARTMENT OF STATE
"OFFICE OF THE SOLICITOR

May 31, 1921

"The formation of the Kingdom of the Serbs, Croats and Slovenes apparently presents a situation different from that arising out of the formation of the German Empire by the amalgamation of several independent states, which united to form a new entity, the German Empire. I believe it may be said that Serbia absorbed the territories which came to her as a result of the war and that these territories can properly, from the standpoint of our law, be regarded as covered by our treaties with Serbia. In due course an understanding can be reached with Jugo-Slavia on the subject. The government of that country has, I think, already indicated that it considers the old Serbian treaties applicable to the present Kingdom.

"F K N"

"FKN:HLC
"SO

Thereupon emerged the only decision of the United States Government relied upon by the Court of Appeals—the opinion of the United States Secretary of State in a letter to the law firm of Defrees, Buckingham and Eaton (New York), dated June 4, 1921, that the Serbian treaties were applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes; and to this opinion the Kingdom of the Serbs, Croats and Slovenes assented by diplomatic note of September 1921.

Admitting that the political decision of one administration of the United States Government may be reversed by a later administration, nevertheless petitioner submits that the legal effects of the first decision in this case, i.e., the termination of Serbian treaties, cannot be expunged from the record except by constitutional exercise of the treaty-making power by the United States Government, and the above exchange of consents is not such a constitutional exercise.

REASONS FOR THE ALLOWANCE OF THE WRIT

These causes present at least two important questions of federal law which have not, but should be, adjudicated by this Court. Briefly, they are:

1. In the absence of an outright declaration of the fact by the United States Government, are bilateral treaties between the United States and a foreign state terminated by the extinction or disappearance of the foreign state?

While this Honorable Court decided in the celebrated case of *Hilton* v. *Guyot,* 1895, 159 U.S. 113, 40 L. ed. 95, 16 S. Ct. Rep. 139, that international law is a part of the law of the United States and should be ascertained and administered by the courts, research upon other decisions of this Honorable Court by petitioner has revealed not one in which it was held that a bilateral treaty to which the United States is a contracting party is or is not terminated upon the extinction or disappearance of the other contracting party.

Petitioner believes that such a question of treaty termination is presented in the instant causes. Petitioner further believes that the Court of Appeals, by ignoring in its opinion the extinction or disappearance of Serbia, has not recognized or applied the proper rule of international law, and that this Honorable Court should review these causes and determine whether bilateral treaties between the United States and a foreign state are terminated by the extinction of the foreign state.

2. If a bilateral treaty is so terminated, but the United States Government two or more years later reverses its recognition of the extinction of the other contracting party thereto, may the treaty be revived or renewed by the consent of the contracting parties without full compliance by the United States with the treaty-making provisions of its Constitution?

Petitioner believes that this question was stated but unanswered by this Honorable Court in *Terlinden* v. *Ames,* 1902, 184 U.S. 270, 285, 46 L. ed. 534, 544, reading—

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution * * *."

As this question has not been answered, so far as discovered by petitioner's research, in other decisions of this Honorable Court, and as the Court of Appeals has not recognized or ruled upon this question, petitioner believes that this Honorable Court should review these causes and rule upon this question.

That decision upon these questions is important to the future treaty negotiations of the Executive Department of the United States Government is appreciated, but petitioner rejects as unsupported the suggestion of the United States as amicus curiae quoted in the opinion of the Court of Appeals (Record, page 406, footnote 4), that decision favorable to his position would create "great confusion", because petitioner has not alleged, as suggested, that "mere change in the form [or name] of government or the expansion or contraction of geographical boundaries" is the basis for treaty termination.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these causes should be granted.

Respectfully submitted,

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APPENDIX 1

The Special Agent at Corfu (Dodge) to the Secretary of State

No. 107

Corfu, August 26, 1918.
[Received October 8]

Sir: I have the honor to acknowledge the receipt, late on the 8th instant, of your telegram of the 7th instant, 6 p.m., informing me that confidential reports were desired by the Department from time to time regarding the position of the Serbian Government as to the character of the relation to be established between Serbia and the Yugo-Slav provinces of Austria-Hungary in the event that the latter obtained their freedom.

Such reports will be furnished as desired. I may mention that during my residence here I have heard and seen in the Serbian and Yugo-Slav press little as to the details of this matter, the broad outlines of which are laid down in the so-called "Declaration of Corfu", the text and a translation of which were enclosed in my despatch No. 2 of July 27, 1917. The members of the Government and other Serbs with whom I have talked upon this subject always assume that the constitution of the desired Yugo-Slav state will be based upon the principles laid down in this declaration. Unfortunately at present several of the principal members of the Government, including Mr. Pashitch, are absent from Corfu and expecting to remain away for some time. I have, however, taken advantage of my recent trip to Salonica (to be reported in a later despatch) during which I was constantly with Mr. Nintchitch, Minister of Public Works, and Mr. Gavrilovitch, now in charge of the Foreign Office, to ascertain from them what I could as to this matter. In so doing I have of course made no mention of the Department's desire. The following is the substance of what I learned:

Mr. Nintchitch: The character of the relation to be established between Serbia and the Yugo-Slav populations of Austria-Hungary is determined in its outlines by the Act of Corfu which declares that the new state shall be a free democracy in which all the citizens shall be equal and having equal rights before the state and the law. It also prescribes that all elections whether national, departmental

or communal shall be by universal, equal, direct and secret ballot. This act was signed by Mr. Pashitch, representing the Serbian Government, and by Dr. Ante Trumbitch, representing the other Yugo-Slav peoples. It was drafted at conferences at which there took part for Serbia, in addition to Mr. Pashitch, representatives of the principal other Serbian political parties and, in addition to Doctor Trumbitch, who is a Dalmatian, two other members of the Yugo-Slav Committee, one a Slovene and the other a Croatian. All the members of the conference unanimously approved of the act. Its text had immediately been published in Austria-Hungary and in Germany and became well-known to the Austro-Hungarian Yugo-Slavs and, so far as could be ascertained, won the approval of a very large majority of them. Of course, owing to the strict censorship and the difficulty of direct communication with these Yugo-Slavs as a whole, their sentiments could not be ascertained as exactly as they could in normal conditions. Nevertheless enough was known to make Mr. Nintchitch feel convinced that a very large majority of the Austro-Hungarian Yugo-Slavs enthusiastically supported the act. Yugo-Slavs abroad in Allied or neutral countries had also shown clearly their entire approval, including those in the United States.

The act only attempted to determine the broad outlines of the future government, as it had been considered unwise to go into details both because the members of the conference might not in that case be able to agree upon them unanimously and because such details might have caused differences of opinion outside the conference leading to discussion which in the present circumstances it was most important to avoid. Further the conference, which was not an elected body and was only in a sense representative, it being impossible to elect a truly representative body at the time, felt that it should not go beyond the outlines which all were practically certain to accept or attempt to bind the Yugo-Slav people as to details.

For the same reason and as freedom of expression was denied to the Yugo-Slavs in Austria-Hungary, it had been considered best to discourage any discussion of the details of the future government in the Serbian and Yugo-Slav press abroad. Very little such discussion had therefore appeared.

According to the Act of Corfu, the future state was not to be a federal one but a centralized state with local autonomies. So much was clear and was considered necessary, as the future state must be strong, as it would have enemies on or near its borders, Bulgaria and Germany: to the latter it must be a barrier to prevent German schemes of conquest in the Near East. Such a centralized state was understood to be desired by the Croatians and Slovenes. Regarding the organization of such a centralized state, Mr. Nintchitch declared that this would be left entirely to the decision of the freely-elected representatives of all the Yugo-Slav people. As soon as practicable after the Yugo-Slavs of Austria-Hungary had obtained their freedom, a constitutional convention would be called and this convention would freely draft the constitution of the future state. According to the Act of Corfu, the members of the convention would be elected by equal, direct, secret and universal suffrage.

Mr. Nintchitch discussed a few further details as to the future form of government but was careful to mention that the ideas he expressed were merely his own personal ones. The capital of the new state he thought should be Belgrade but in that case the King would be obliged to be in residence during regular periods of the year at cities in Croatia, Slovenia, etc., and especially at Agram. He mentioned a strong argument, to his thinking, against the maintenance of the present boundaries of the Yugo-Slav portions of Austria-Hungary in the new state, for the Serbs in Croatia, Dalmatia, Bosnia and Herzegovina would in that case desire to be united with Serbia, and as they must have the right of self-disposition this would of itself produce a very material modification of the present boundaries. Moreover the Crotians of Dalmatia, Bosnia and Herzegovina would also be desirous of being united to Croatia. There were, he thought, about three million Serbs left in the present Kingdom and as many more in the Banat, [Bachka], Montenegro, Croatia, Dalmatia, Bosnia and Herzegovina. The new state would include from twelve to thirteen million inhabitants about one-half of whom would be Serbs.

In a general way Mr. Nintchitch thought that the political organization of the new state should be like that of the present Kingdom of Serbia although the departments

into which it would be divided might well have more local autonomy. It would be a parliamentary form of government with the Parliament elected, as prescribed by the Act of Corfu, by equal, direct, secret and universal suffrage. Ministers would be responsible to Parliament. Each of the present Serbian departments has a local assembly elected by universal suffrage. Its legislative powers are determined by the various laws passed by the Skupshtina and are usually limited to small local matters such as primary schools, communal roads, minor sanitary and police matters, etc. The acts of these assemblies are, however, subject to the veto of the Minister of the Interior who is himself responsible to the Skupshtina. Under the new constitution the powers of the departmental assemblies might be considerably enlarged.

Mr. Nintchitch did not think that the various portions of the new Kingdom would be found to differ to any great extent in the degree of their culture and civilization nor that the undoubtedly different interests of different portions would present any difficulties to harmonious cooperation. The different interests would be given free expression through local autonomies and the freely elected central parliament. It was true, however, that Serbia would enter the new state in a far more exhausted condition than the other Yugo-Slavs. He admitted that the new constitution would naturally be a good deal of an experiment, but changes would subsequently be made as found necessary, and with the profound desire for union of all the component parts of the new state, an arrangement satisfactory to all would eventually be found.

The statements made to me by Mr. Gavrilovitch were, so far as they went, similar to those of Mr. Nintchitch. Mr. Gavrilovitch, however, appeared anxious to avoid entering into details or expressing any personal opinion, stating that all discussion of such matters should be left for after the war and for the constitutional convention. It was sufficient for the present to fight for the liberation of the Yugo-Slav portions of Austria-Hungary. After their liberation it would be time enough to discuss details of the future state which must be based upon the Act of Corfu.

I have [etc.]

H. Percival Dodge

The Special Agent at Corfu (Dodge), Temporarily at Rome, to the Secretary of State

No. 113

Rome, September 13, 1918.
[Received October 21]

Sir: Referring to my despatch No. 107, of the 26th ultimo, reporting, in accordance with your telegram of August 7, 6 p.m., regarding the position of the Serbian Government as to the character of the relation to be established between Serbia and the Yugo-Slav provinces of Austria-Hungary in the event that the latter obtain their freedom,—I have the honor to inform you that shortly before leaving Corfu I had a conversation upon this subject with Mr. Stoyan Protitch, Acting President of the Council and Minister for Foreign Affairs. Mr. Protitch is generally considered to be closer to Mr. Pashitch than any other of his colleagues and comes immediately after Mr. Pashitch in importance in the Radical Party, which is now in power.

* * * * * * * * * *

. . . I inquired of Mr. Portitch as to his views regarding the constitution of a future Yugo-Slav state. Mr. Protitch replied that the foundations for such a state must lie in the Declaration of Corfu, although this declaration might be made even more democratic. All the present Yugo-Slav portions of Austria-Hungary would enjoy absolute political equality with Serbia and there could be no possibility of any Serbian hegemony or superiority of any sort. Serbia moreover desired no such superiority. He saw no reason why sooner or later Bulgaria should not also join the Yugo-Slav state if she agreed to come in on the same footing as the others. Bulgarians spoke a tongue closely allied to Serbian and there was no very great racial difference between Bulgarians and Serbians, although the former had a considerable admixture of Turanian blood. This would be the logical solution and he greatly hoped it would some day be possible.

Regarding the details of the form of government, these must naturally be left to be decided by the constitutional convention which would be called and elected (as all elections were prescribed to be made by the Declaration of Corfu) by equal, direct, secret and universal ballot. His

own idea was, however, that the future state must possess strength. The central Government must, therefore, control military, naval and foreign affairs, national finances and national economic and commercial matters. Also, the civil and criminal law must be uniform for the whole state. Outside of these matters, the rest and all local matters must be left to local assemblies. The administrative divisions of the state might remain as at present, each division having its local assembly, or the present divisions might be somewhat modified or possibly entirely new divisions might be made: All this depended upon the decisions of the constitutional convention. The central Government it- the constitutional convention. The central Government would be a ministry, responsible to Parliament as at present. Parliament itself might well be composed of two Chambers instead of one Chamber as at present.

Mr. Protitch emphasized the democratic character of the new state and the absolute equality of all its inhabitants and territories.

I have also recently had an interview with General Rachitch, Minister of War, in which I was able to turn the conversation to the same subject. General Rachitch stated that it was quite impossible to go into any details at present as all of these must be settled by the constitutional convention. Nevertheless, he might say that the new state must, of course, be built upon thoroughly democratic principles and upon the outlines so clearly laid down on the Declaration of Corfu. Complete equality would be guaranteed to all portions of the new territories and their inhabitants. Serbia must enjoy no position in the new state in any privileged or different from other portions. If Serbia should become pre-eminent in the new state it would only be through the individual merits of her population.

Several of my colleagues with whom I have talked on this subject express the opinion that the present Serbia, in the possible future state, will tend to be over-shadowed by Croatia which is only slightly smaller in population and is far more advanced educationally, economically and financially. Croatia has also suffered far less than Serbia in the present and recent Balkan wars. In addition to enormous losses of productive capital, Serbia, it is gen-

erally assumed, has lost fully one-quarter of her population since the first Balkan War.

I have [etc.]

H. PERCIVAL DODGE

The Charge in Yugoslavia (Dodge) to the Acting Secretary of State

No. 147

Belgrade, January 19, 1919.
[Received February 11]

Sir: I have the honor to enclose to you herewith a clipping from the *Pravda* of the 26th. December/8th. January giving the text of a proclamation addressed on Christmas Day, old style, by the Prince Regent to the Serb, Croat and Clovene people. I also enclose a translation which I have made from a French translation of this proclamation.

The proclamation will be found to be of considerable interest as it outlines the future plans of the Government. These in general outline have already been reported, especially in my Despatch No. 137* of December 24th. After referring to the final union of the Serbs, Croats and Slovenes in a single Kingdom by the unanimous wish of the people, and mentioning the representative character of the present Cabinet composed of men of all the political parties, regions and creeds of the new State, the proclamation describes the composition of the provisional body which under the name of "National Council" is to act as a national parliament until a parliament is elected under the Constitution to be framed by the Constitutional Convention. It will be noted that this Council is to include delegates of the various National Councils which exist in each of the Yugoslav provinces of the former Austro-Hungarian Empire and delegates from the Banat and Batschka (the Voivodina). It will also include, from Serbia proper, in addition to delegates of the Skupschtina, delegates from the territories of Old Serbia and Macedonia which were acquired during the Balkan wars. It will be remembered that these territories, while annexed to Serbia, were placed under a special regime and were not allowed to be repre-

* Not made public by the U.S. Department of State.

sented in the Skupschtina. This regime is in fact generally acknowledged to have been harsh and meddlesome.

The proclamation then declares that the corner-stone of the new State and its liberties will be constitutional and parliamentary Government and that the Constitutional Convention will be elected upon a basis of universal suffrage. The Cabinet will submit to the Constitutional Convention a draft for a democratic Constitution on the basis of a unified State with extensive local autonomies and the strictest guaranties for political and personal rights. The future Government is not to be a federal one but a strongly unified State with local autonomies. As formerly reported, there appears to have been from the beginning little popular sentiment in favor of a federal form of Government although it is generally stated that local autonomy in the new State will be more extensive than it has been in Serbia. The chief reason given for desiring a centralized State is in order that it may be stronger in a military sense as it will have enemies in Germany and Hungary.

All the liberties and rights now given to the population of Serbia by its Constitution are to be extended over all the new Kingdom. This will be a distinct democratic gain in the former Austro-Hungarian provinces where much of the present legislation is aristocratic and even feudal in character. This is especially true in Croatia and especially as regards the land laws which favor large estates. Many of these are of vast extent (as those of the Odescalchi family) and the peasants living in them are little better than serfs. The recent unrest in Croatia is largely economic in character and owing to the desire of the peasants to acquire the land which they till. In Serbia the reverse is the case and in fact the whole country is one of peasant proprietors.

The proclamation also refers to the duty of the Government to relieve the present distress, to care for the victims of the war and to reconstruct the country. It calls upon the people to forget their differences and to trust and support the Government in order that the Government may inspire confidence abroad and be able to obtain its true ethnographic frontiers. In describing the extent of these frontiers "unquestioned sovereignty" is mentioned "from one end to the other of our sea." This phrase may be consid-

ered somewhat unfortunate but from what I have been told by persons in authority, it should in no way be taken as signifying more than a desire for the ordinary rights of a nation having a sea-coast.

I have been assured lately by several prominent political men, including the acting Minister for Foreign Affairs, Dr. Gavrilovitch, that the Cabinet is strongly opposed to including in the Kingdom any territories not peopled by Serbs, Croats and Slovenes, especially owing to the danger which this would cause to the Kingdom. Where this appears to be a necessity, as in the case of the Italian populations of Fiume and Zara, the fullest educational and language liberties would be given.

Certain of the measures mentioned in the Prince Regent's proclamation have already been executed. The National Council has already been chosen and is expected to meet about March 1st. The Skupschtina which has held a short session, has elected the Serbian delegates and adjourned, presumably to meet no more. A special Ministry has been appointed for preparing for the coming Constitutional Convention, as has already been reported, and is stated to be already engaged in drafting an electoral law for this Convention and considering plans for a Constitution. A decree has already been published extending to all the Kingdom the rights and liberties enjoyed in Serbia. Regarding the relief of the indigent population and reconstruction however, little has yet been done. Lack of funds is partly responsible for this, lack of efficient administrative personnel and a certain weariness and demoralization after six years of exhausting warfare. The Crotians show more ability in such measures that the Serbs, owing to their having suffered less and possessing more administrative ability. It is however a herculean task and it is especially unfortunate that it must be accomplished at a time when so many matters absorbing political importance are forcing their solution. Without substantial foreign assistance, proper relief and reconstruction will be beyond the Government's powers.

While adding that I have sent a copy of this Despatch to the Secretary of State in Paris, I have [etc.]

H. Percival Dodge